

AMENDED IN ASSEMBLY JULY 1, 2009

AMENDED IN SENATE MAY 28, 2009

AMENDED IN SENATE APRIL 28, 2009

**SENATE BILL**

**No. 401**

---

**Introduced by Senator Wolk**

February 26, 2009

---

An act to amend Sections 19116, 19504, 19755, and 19777 of, and to add Section 18407.5 to, the Revenue and Taxation Code, relating to taxation.

LEGISLATIVE COUNSEL'S DIGEST

SB 401, as amended, Wolk. Administration of taxes: abusive tax avoidance transactions: transactions of ~~internet~~. *interest*.

Existing law ~~imposes various~~ *requires the Franchise Tax Board to administer specified* taxes and fees, and certain penalties in connection with tax avoidance and abusive tax shelters, including reportable transactions.

This bill would expand the definition of reportable transactions to include abusive tax avoidance transactions, as defined, and transactions of interest, as defined. This bill would also make technical, nonsubstantive changes to conform to this ~~reference~~ *expansion*.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

*The people of the State of California do enact as follows:*

- 1 SECTION 1. Section 18407.5 is added to the Revenue and
- 2 Taxation Code, to read:

1 18407.5. (a) The term “reportable transaction,” as defined in  
2 paragraph (3) of subdivision (a) of Section 18407, shall also include  
3 any transaction of a type that the Secretary of the Treasury under  
4 Section 6011 of the Internal Revenue Code for federal income tax  
5 purposes or the Franchise Tax Board under this section for  
6 California income or franchise tax purposes determines is a  
7 transaction of interest, and shall be reported on the return or the  
8 statement required to be made.

9 (b) A transaction of interest is a transaction that is the same as  
10 or substantially similar to one of the types of transactions that the  
11 Franchise Tax Board has identified by ~~notice, regulation, or other~~  
12 ~~form of published guidance~~ *notice or regulation* as a transaction  
13 of interest. In addition, the transactions of interest identified and  
14 published pursuant to the preceding sentence shall be published  
15 on the Internet Web site of the Franchise Tax Board.

16 (c) This section shall apply to transactions of interest published  
17 on or after the effective date of the act adding this section *and only*  
18 *to taxable years beginning on or after the effective date of this*  
19 *section.*

20 SEC. 2. Section 19116 of the Revenue and Taxation Code is  
21 amended to read:

22 19116. (a) In the case of an individual who files a return of  
23 tax imposed under Part 10 (commencing with Section 17001) for  
24 a taxable year on or before the due date for the return, including  
25 extensions, if the Franchise Tax Board does not provide a notice  
26 to the taxpayer specifically stating the taxpayer’s liability and the  
27 basis of the liability before the close of the notification period, the  
28 Franchise Tax Board shall suspend the imposition of any interest,  
29 penalty, addition to tax, or additional amount with respect to any  
30 failure relating to the return which is computed by reference to the  
31 period of time the failure continues to exist and which is properly  
32 allocable to the suspension period.

33 (b) For purposes of this section:

34 (1) Except as provided in subdivision (e), “notification period”  
35 means the 18-month period beginning on the later of either of the  
36 following:

37 (A) The date on which the return is filed.

38 (B) The due date of the return without regard to extensions.

39 (2) “Suspension period” means the period beginning on the day  
40 after the close of the notification period and ending on the date

1 which is 15 days after the date on which notice described in  
2 subdivision (a) is provided by the Franchise Tax Board.

3 (c) This section shall be applied separately with respect to each  
4 item or adjustment.

5 (d) This section shall not apply to any of the following:

6 (1) Any penalty imposed by Section 19131.

7 (2) Any penalty imposed by Section 19132.

8 (3) Any interest, penalty, addition to tax, or additional amount  
9 involving fraud.

10 (4) Any interest, penalty, addition to tax, or additional amount  
11 with respect to any tax liability shown on the return.

12 (5) Any criminal penalty.

13 (6) Any interest, penalty, addition to tax, or additional amount  
14 with respect to any gross misstatement.

15 (7) Any interest, penalty, addition to tax, or additional amount  
16 relating to any reportable transaction with respect to which the  
17 requirements of Section 6664(d)(2)(A) of the Internal Revenue  
18 Code are not met, and any listed transaction, as defined in Section  
19 6707A(c) of the Internal Revenue Code.

20 (8) Any interest, penalty, addition to tax, or additional amount  
21 relating to any abusive tax avoidance transaction, as defined in  
22 Section 19777, as amended by the act adding this paragraph.

23 (e) For taxpayers required by subdivision (a) of Section 18622  
24 to report a change or correction by the Commissioner of Internal  
25 Revenue or other officer of the United States or other competent  
26 authority the following rules shall apply:

27 (1) The notification period under subdivision (a) shall be either  
28 of the following:

29 (A) One year from the date the notice required by Section 18622  
30 is filed with the Franchise Tax Board by the taxpayer or the Internal  
31 Revenue Service, if the taxpayer or the Internal Revenue Service  
32 reports that change or correction within six months after the final  
33 federal determination.

34 (B) Two years from the date when the notice required by Section  
35 18622 is filed with the Franchise Tax Board by the taxpayer or the  
36 Internal Revenue Service, if after the six-month period required  
37 in Section 18622, a taxpayer or the Internal Revenue Service  
38 reports a change or correction.

39 (2) The suspension period under subdivision (a) shall mean the  
40 period beginning on the day after the close of the notification

1 period under paragraph (1) and ending on the date which is 15  
2 days after the date on which notice described in subdivision (a) is  
3 provided by the Franchise Tax Board.

4 (f) For notices sent after January 1, 2004, this section does not  
5 apply to taxpayers with taxable income greater than two hundred  
6 thousand dollars (\$200,000) that have been contacted by the  
7 Franchise Tax Board regarding the use of a potentially abusive tax  
8 shelter, within the meaning of Section 19777, as added by Chapter  
9 656 of the Statutes of 2003 and amended by Section 331 of Chapter  
10 183 of the Statutes of 2004.

11 (g) This section shall apply to taxable years ending after October  
12 10, 1999.

13 (h) The amendments made to this section by Chapter 691 of the  
14 Statutes of 2005 shall apply to notices sent after January 1, 2005.

15 (i) The amendments made to this section by the act adding this  
16 subdivision shall apply to notices mailed, or amended returns filed,  
17 on or after the effective date of the act adding this subdivision.

18 SEC. 3. Section 19504 of the Revenue and Taxation Code is  
19 amended to read:

20 19504. (a) The Franchise Tax Board, for the purpose of  
21 administering its duties under this part, including ascertaining the  
22 correctness of any return; making a return where none has been  
23 made; determining or collecting the liability of any person in  
24 respect of any liability imposed by Part 10 (commencing with  
25 Section 17001), Part 11 (commencing with Section 23001), or this  
26 part (or the liability at law or in equity of any transferee in respect  
27 of that liability); shall have the power to require by demand, that  
28 an entity of any kind including, but not limited to, employers,  
29 persons, or financial institutions provide information or make  
30 available for examination or copying at a specified time and place,  
31 or both, any book, papers, or other data which may be relevant to  
32 that purpose. Any demand to a financial institution shall comply  
33 with the California Right to Financial Privacy Act set forth in  
34 Chapter 20 (commencing with Section 7460) of Division 7 of Title  
35 1 of the Government Code. Information that may be required upon  
36 demand includes, but is not limited to, any of the following:

37 (1) Addresses and telephone numbers of persons designated by  
38 the Franchise Tax Board.

39 (2) Information contained on Federal Form W-2 (Wage and Tax  
40 Statement), Federal Form W-4 (Employee's Withholding

1 Allowance Certificate), or State Form DE-4 (Employee's  
2 Withholding Allowance Certificate).

3 (b) The Franchise Tax Board may require the attendance of the  
4 taxpayer or of any other person having knowledge in the premises  
5 and may take testimony and require material proof for its  
6 information and administer oaths to carry out this part.

7 (c) (1) The Franchise Tax Board may issue subpoenas or  
8 subpoenas duces tecum, which subpoenas must be signed by any  
9 member of the Franchise Tax Board, and may be served on any  
10 person for any purpose.

11 (2) For taxpayers that have been contacted by the Franchise Tax  
12 Board regarding the use of an abusive tax avoidance transaction,  
13 as defined by Section 19777 as amended by the act amending this  
14 paragraph, the subpoena may be signed by any member of the  
15 Franchise Tax Board, the Executive Officer of the Franchise Tax  
16 Board, or any designee.

17 (d) Obedience to subpoenas or subpoenas duces tecum issued  
18 in accordance with this section may be enforced by application to  
19 the superior court as set forth in Article 2 (commencing with  
20 Section 11180) of Chapter 2 of Part 1 of Division 3 of Title 2 of  
21 the Government Code.

22 (e) When examining a return, the Franchise Tax Board shall  
23 not use financial status or economic reality examination techniques  
24 to determine the existence of unreported income of any taxpayer  
25 unless the Franchise Tax Board has a reasonable indication that  
26 there is a likelihood of unreported income. This subdivision applies  
27 to any examination beginning on or after October 10, 1999.

28 (f) The amendments made to this section shall apply to  
29 subpoenas issued on or after the effective date of the act adding  
30 this subdivision.

31 SEC. 4. Section 19755 of the Revenue and Taxation Code, as  
32 added by Section 13 of Chapter 654 of the Statutes of 2003, is  
33 amended to read:

34 19755. (a) Notwithstanding Section 19057, with respect to  
35 proposed deficiency assessments related to an abusive tax  
36 avoidance transaction, as defined in Section 19777, other than a  
37 gross misstatement within the meaning of Section 6404(g)(2)(D)  
38 of the Internal Revenue Code, a notice of a proposed deficiency  
39 assessment may be mailed to the taxpayer within eight years after  
40 the return was filed, or within the period otherwise provided in

1 Article 3 (commencing with Section 19031) of Chapter 4 of this  
2 part, whichever expires later.

3 (b) This section shall apply to any return filed under this part  
4 on or after January 1, 2000.

5 (c) The amendments made to this section by the act adding this  
6 subdivision shall apply to taxable years beginning on or after  
7 January 1, 2009.

8 SEC. 5. Section 19755 of the Revenue and Taxation Code, as  
9 added by Section 13 of Chapter 656 of the Statutes of 2003, is  
10 amended to read:

11 19755. (a) Notwithstanding Section 19057, with respect to  
12 proposed deficiency assessments related to an abusive tax  
13 avoidance transaction, as defined in Section 19777, other than a  
14 gross misstatement within the meaning of Section 6404(g)(2)(D)  
15 of the Internal Revenue Code, a notice of a proposed deficiency  
16 assessment may be mailed to the taxpayer within eight years after  
17 the return was filed, or within the period otherwise provided in  
18 Article 3 (commencing with Section 19031) of Chapter 4 of this  
19 part, whichever expires later.

20 (b) This section shall apply to any return filed under this part  
21 on or after January 1, 2000.

22 (c) The amendments made to this section by the act adding this  
23 subdivision shall apply to taxable years beginning on or after  
24 January 1, 2009.

25 SEC. 6. Section 19777 of the Revenue and Taxation Code is  
26 amended to read:

27 19777. (a) If a taxpayer has been contacted by the Franchise  
28 Tax Board regarding an abusive tax avoidance transaction, and  
29 has a deficiency attributable to an abusive tax avoidance  
30 transaction, there shall be added to the tax an amount equal to 100  
31 percent of the interest payable under Section 19101 on the portion  
32 of the deficiency attributable to that transaction for the period  
33 beginning on the last date prescribed by law for the payment of  
34 that tax (determined without regard to extensions) and ending on  
35 the date the notice of proposed assessment is mailed.

36 (b) For purposes of this section, “abusive tax avoidance  
37 transaction” means any of the following:

38 (1) A tax shelter as defined in Section 6662(d)(2)(C) of the  
39 Internal Revenue Code. For purposes of this chapter, Section  
40 6662(d)(2)(C) of the Internal Revenue Code is modified by

1 substituting the phrase “income or franchise tax” for “federal  
2 income tax.”

3 (2) A reportable transaction, as defined in Section 6707A(c)(1)  
4 of the Internal Revenue Code, with respect to which the  
5 requirements of Section 6664(d)(2)(A) of the Internal Revenue  
6 Code are not met.

7 (3) A listed transaction, as defined in Section 6707A(c)(2) of  
8 the Internal Revenue Code.

9 (4) A gross misstatement, within the meaning of Section  
10 6404(g)(2)(D) of the Internal Revenue Code.

11 (5) Any transaction to which Section 19774 applies.

12 (c) The penalty imposed by this section is in addition to any  
13 other penalty imposed under Part 10 (commencing with Section  
14 17001), Part 11 (commencing with Section 23001), or this part.

15 (d) (1) If a taxpayer files an amended return reporting an  
16 abusive tax avoidance transaction, described in subdivision (b),  
17 after the taxpayer is contacted by the Franchise Tax Board  
18 regarding that abusive tax avoidance transaction but before a notice  
19 of proposed assessment is issued under Section 19033, then the  
20 amount of the penalty under this section shall be 50 percent of the  
21 interest payable under Section 19101 with respect to the amount  
22 of any additional tax reflected in the amended return attributable  
23 to that abusive tax avoidance transaction.

24 (2) If a notice of proposed assessment under Section 19033,  
25 with respect to an abusive tax avoidance transaction as described  
26 in subdivision (a), is issued after the amended return described in  
27 paragraph (1) is filed, the penalty imposed pursuant to subdivision  
28 (a) shall be applicable to the additional tax reflected in the notice  
29 of proposed assessment attributable to that abusive tax avoidance  
30 transaction.

31 (e) (1) *If the notice of proposed assessment of additional tax*  
32 *has been sent with respect to a penalty to which this section*  
33 *applies, only the Chief Counsel of the Franchise Tax Board may*  
34 *compromise all or any portion of that penalty.*

35 (2) *The exercise of authority under paragraph (1) shall be at*  
36 *the sole discretion of the Chief Counsel of the Franchise Tax Board*  
37 *and may not be delegated.*

38 (3) *Notwithstanding any other law or rule of law, any*  
39 *determination under this subdivision may not be reviewed in any*  
40 *administrative or judicial proceeding.*

1     ~~(e)~~

2     ~~(f)~~ The provisions of paragraph (4) of subdivision (b) shall not  
3 apply solely on the basis that a limited liability company or an “S”  
4 corporation is used in the structure of an investment plan or  
5 arrangement, or other plan or arrangement. If, however, a limited  
6 liability company or an “S” corporation is used to facilitate an  
7 abusive tax avoidance transaction, the preceding sentence shall  
8 not apply.

9     ~~(f)~~

10    ~~(g)~~ The amendments made to this section by the act adding this  
11 subdivision shall apply to notices mailed on or after the effective  
12 date of the act and to amended returns filed more than ~~90~~ 180 days  
13 after the effective date with respect to taxable years for which the  
14 ~~statute of limitations for mailing a notice of proposed assessment~~  
15 ~~has not expired as of that date.~~ *beginning on or after the effective*  
16 *date of this section.*